Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM C. HINDENLANG,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

WILLIAM B. FECHER
· *Counsel of Record*
ALAN J. STATMAN
DOUGLAS HAMAN
REISENFELD & STATMAN
Attorneys for Petitioner
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810

152536

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

5788

QUESTION PRESENTED

Contrary to the plain language of the Bankruptcy Code, and contrary to the decisions of numerous courts which have considered the issue, the Sixth Circuit Court of Appeals erroneously concluded that the Petitioner was precluded from a discharge of his tax obligations merely because he filed tax returns after the Internal Revenue Service had prepared "substitutes for returns" and had assessed the taxpayer for the obligations set forth in these returns. Therefore, this Petition presents the following question:

Is a Chapter 7 debtor precluded from obtaining a discharge of tax liabilities when the taxpayer files tax returns after the tax obligations have been assessed based upon "substitutes for returns" prepared by the Internal Revenue Service?

PARTIES TO THE PROCEEDINGS

Petitioner, William C. Hindenlang, was the Debtor in the Chapter 7 proceeding filed in the Bankruptcy Court. The Respondent is the United States of America, Internal Revenue Service, a defendant in the adversary proceeding filed by the Petitioner. The Chapter 7 Trustee was E. Hanlin Bavely.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Contents	iii
Table of Cited Authorities	v
Table of Appendices	viii
Opinions Below	1
Statement of Jurisdiction	1
Statutory Provisions Involved	1
Statement of the Case	4
A. Statement of Facts	5
B. The Proceedings Below	7
Reasons for Granting the Writ	9
I. The Petition Should Be Granted As The Decision Of The Court Of Appeals Conflicts With The Clear And Unambiguous Language Of The Bankruptcy Code.	9

Contents

	Page
II. The Decision Of The Court Of Appeals Is In Conflict With A Decision Of The Bankruptcy Appellate Panel For The Tenth Circuit And With Other Federal Court Decisions.	13
Conclusion	16

TABLE OF CITED AUTHORITIES

Page

Cases:

Beard v. Commissioner, 82 T.C. 766 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986) 11

Gentry v. United States, 223 B.R. 127 (M.D. Tenn. 1998), *aff'g. In re Gentry (Gentry v. United States)*, 214 B.R. 847 (Bankr. M.D. Tenn. 1997) 15

Germantown Trust Co. v. Commissioner of Internal Revenue, 309 U.S. 304 (1940) 11

Gozlon-Peretz v. United States, 498 U.S. 404 (1991) 10

Grogan v. Garner, 498 U.S. 279 (1991) 8

In re Laurian, 113 F.3d 595 (6th Cir. 1997) 10

In re McGrath, 217 B.R. 389 (Bankr. N.D. N.Y. 1997) 14

In re Mickens, 215 B.R. 693 (Bankr. N.D. Ohio 1997), *aff'd*, 214 B.R. 976 (N.D. Ohio 1997), *aff'd*, *In re Mickens*, (No. 97-4163) __ F.3d __, 83 A.F.T.R. 2d 99-738 (6th Cir. Jan. 29, 1999) 13, 14, 15

In re Pierchoski, 220 B.R. 20 (W.D. Pa. 1998) 14

In re Savage, 218 B.R. 126 (10th Cir. BAP 1998) ... 13, 14

Cited Authorities

	Page
In re Ward, 857 F.2d 1082 (6th Cir. 1988).	9
Stellwagen v. Clum, 245 U.S. 605 (1918)	9
United States v. Ron Pair Enterprises, 489 U.S. 235 (1989)	8, 10
Zellerbach Paper Co. v. Helvering, 293 U.S. 172 (1934)	11
Statutes:	
11 U.S.C. § 507(a)(8)	2, 10
11 U.S.C. § 507(a)(8)(ii)	10
11 U.S.C. § 507(a)(8)(A)(ii)	14
11 U.S.C. § 523(a)	9
11 U.S.C. § 523(a)(1)	2, 7
11 U.S.C. § 523(a)(1)(A)	10
11 U.S.C. § 523(a)(1)(B)	4, 8, 12, 14
11 U.S.C. § 523(a)(1)(B)(i)	4, 5, 7, 9, 14
11 U.S.C. § 523(a)(1)(B)(ii)	10
11 U.S.C. § 523(a)(1)(C)	7, 9, 12, 14
11 U.S.C. § 727	3, 4, 7, 9

Cited Authorities

	Page
26 U.S.C. § 6011(a)	1, 12
26 U.S.C. § 6020(b)	6
28 U.S.C. § 1254(1)	1
Other Authority:	
S. Rep. No. 1106, 95th Cong., 2nd Sess. 22 (1978)	14

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated And Filed January 22, 1999 ..... 1a

Appendix B — Opinion And Order Of The United States District Court For The Southern District Of Ohio, Western Division Dated And Filed September 10, 1997 ..... 13a

Appendix C — Judgment Of The United States District Court For The Southern District Of Ohio, Western Division Dated And Filed September 10, 1997 .. 19a

Appendix D — Decision Of The United States Bankruptcy Court For The Southern District Of Ohio, Western Division On Cross-Motions For Summary Judgment Dated And Filed February 24, 1997 ... 21a

Appendix E — Judgment On Decision Of The United States Bankruptcy Court For The Southern District Of Ohio, Western Division Dated And Filed February 24, 1997 ..... 33a

Petitioner, William C. Hindenlang, ("Petitioner") respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at *In re William C. Hindenlang: United States of America v. William C. Hindenlang*, 164 F.3d 1029 (6th Cir. 1999) (App. A). The opinion of the United States District Court for the Southern District of Ohio is reported at *United States v. Hindenlang (In re Hindenlang)*, 214 B.R. 847 (S.D. Ohio 1997) (App. B). The opinion of the United States Bankruptcy Court for the Southern District of Ohio, Western Division, is reported at *United States v. Hindenlang (In re Hindenlang)*, 205 B.R. 874 (Bankr. S.D. Ohio 1997) (App. D).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on January 22, 1999.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Under 26 U.S.C. § 6011(a), titled the "[g]eneral requirement of return, statement, or list," the Internal Revenue Code provides:

> [w]*hen required by regulations* prescribed by the Secretary any person made liable for any tax imposed by this title, or with respect to the collection thereof, shall make a return or statement according to the forms and regulations prescribed by the Secretary. Every person required to make a return or statement shall include therein the information required by such forms or regulations.

Section 507(a)(8) reads:

> a tax on or measured by income or gross receipts —
>
> > (i) * * *;
> >
> > (ii) assessed within 240 days, plus any time plus 30 days during which an offer in compromise with respect to such tax was made within 240 days after such assessment was pending, before the date of the filing of the petition; or
> >
> > (iii) * * *

Section 523(a)(1) of the Bankruptcy Code reads:

> (a) A discharge under § 727 . . . of this title does not discharge an individual debtor from any debt —
>
> > (1) for a tax or customs duty —
> >
> > > (A) of the kind and for the periods specified in § 507(a)(2) or 507(a)(8)

> of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required —
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax.

Section 727 of the Bankruptcy Code reads:

> (a) The court shall grant the debtor a discharge, unless — * * *
>
> (b) Except as provided in § 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter[.]

STATEMENT OF THE CASE

The issue to be decided is whether the Court of Appeals erred when it concluded that the tax returns filed by the Petitioner were of no legal effect and Petitioner was thereby precluded from receiving a discharge, otherwise available under 11 U.S.C. § 727, of his tax liabilities under the exception contained in 11 U.S.C. § 523(a)(1)(B)(i). Both the Bankruptcy Court and the District Court concluded that the fact the Internal Revenue Service ("IRS") had prepared "substitutes for returns" ("SFRs") and had assessed the Petitioner for these tax obligations was irrelevant to the issue of whether the Petitioner was entitled to a discharge of tax liabilities under the Bankruptcy Code.

The Court of Appeals reversed the Decision of the District Court, concluding that the filing of a document purporting to be a tax return, after the IRS had prepared SFRs and had assessed the taxpayer for these tax obligations, could not, as a matter of law, constitute the filing of a "return" which would preclude a denial of the discharge under 11 U.S.C. § 523(a)(1)(B).

The Decision of the Court of Appeals is contrary to the plain, unambiguous language of the Bankruptcy Code and, moreover, there is no support for the Decision within the Internal Revenue Code. Additionally, the Decision of the Sixth Circuit is contrary to the decisions of a number of bankruptcy courts, district courts and a bankruptcy appellate panel which have considered the issue. Finally, the Decision impedes the intent of Congress to provide debtors, who have not been proven to have engaged in any fraudulent or willful misconduct, a fresh start from their financial difficulties. The Court of Appeals has added a significant burden, not set forth

in the Bankruptcy Code, to obtain a discharge of tax obligations — that the tax returns be filed prior to assessment.

This is a case of first impression for the Court. Although the Court has indirectly commented upon which documents may constitute tax returns, it has not resolved the exact issue presented in this proceeding — whether tax returns, filed after the taxes have been assessed, constitute tax returns so that a bankrupt taxpayer, who had failed to timely file the required tax returns, is not precluded from a discharge pursuant to § 523(a)(1)(B)(i). This requires an balancing of the right of debtors to a financial fresh start against the right of the government to collect tax obligations. The plain language of the Bankruptcy Code demonstrates that Congress intended to provide taxpayers, even taxpayers who fail to timely file tax returns, with a fresh start from their financial difficulties. Requiring tax returns be filed prior to assessment in order to be entitled to a discharge will not result in the fresh start contemplated by the Bankruptcy Code for an otherwise qualified debtor.

Therefore, Petitioner respectfully requests that the Court issue a Writ of Certiorari and reverse the Decision of the Sixth Circuit Court of Appeals.

A. Statement of Facts

Although he received income for the years in questions, the Petitioner failed to file tax returns for the tax years 1985 through 1989 and 1991 through 1992[1] by the annual deadline for the filing of those tax returns. The IRS contacted the

1. The parties agreed that the tax liabilities for the tax years 1989 and 1991 were dischargeable and the tax liabilities for the 1992 tax year were not dischargeable.

Petitioner through the use of "thirty-day" letters which proposed tax deficiencies for the tax years 1985 through 1988. The Petitioner did not respond to these letters. At the appropriate time, the IRS prepared, pursuant to 26 U.S.C. § 6020(b), SFRs for these tax years and forwarded the SFRs to the Petitioner to be signed and returned by the Petitioner. When no response was received, the IRS sent formal "notice of deficiency" letters for these years. When the Petitioner failed to respond to the notices, and failed to file a petition with the Tax Court within ninety days to challenge the notices, the IRS assessed the tax deficiencies, as set forth in the SFRs, against the Petitioner.

In December of 1993, Petitioner submitted tax returns, on forms prescribed by the IRS, to the IRS for the tax years in question. The tax returns submitted by the Petitioner were sworn to and contained sufficient information to calculate his tax obligations. The tax returns were received by the IRS on January 4, 1994. These tax returns mirrored the SFRs prepared by the IRS. Although he submitted the tax returns, he did not make any payments against the tax liabilities set forth in the returns. The IRS accepted the tax returns.[2]

On January 22, 1996, the Petitioner filed his petition for relief under Chapter 7 of the United States Bankruptcy Code. The adversary complaint which gave rise to this appeal was filed within that bankruptcy proceeding.

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2. The tax returns for the years 1991-1997 were submitted at the same time and the IRS has agreed to a discharge of the tax obligations for two of those years, even though the tax returns were not timely filed.

B. The Proceedings Below

The Petitioner filed his Complaint to Determine Dischargeability on February 9, 1996. The Complaint alleged that returns for the tax years in question had been properly filed, that the Petitioner was entitled to a discharge of the taxes pursuant to 11 U.S.C. § 727 and that none of the exceptions to discharge set forth in 11 U.S.C. § 523(a)(1) applied. The IRS filed its answer on March 14, 1996. In its Answer, the IRS defended the action and asserted that taxes were not dischargeable to the extent that the Petitioner had willfully attempted to evade or defeat the tax.[3] The IRS also asserted that the that the tax returns were not timely filed.

The matter proceeded through discovery, which consisted of the taking of Petitioner's deposition. Thereafter, both parties filed motions for summary judgment. Petitioner argued that he had filed tax returns and, therefore, the exception contained in 11 U.S.C. § 523(a)(1)(B)(i) did not apply. Petitioner further argued that, since the IRS neither argued nor offered any evidence that the Petitioner had willfully attempted to evade or defeat his tax obligations, the exclusion of 11 U.S.C. § 523(a)(1)(C) also did not apply.

In response, the IRS argued that the tax returns filed by the Petitioner did not constitute tax returns because they were filed after the IRS had assessed the taxes for the years in question. The IRS sought the establishment of a bright line test — that the filing of a tax return after the IRS had assessed the taxes in question would render the taxes at issue nondischargeable. By adopting a bright line test, the IRS

3. The IRS would *not* continue this argument in the proceedings on the motion for summary judgment or on appeal to the District Court of the Court of Appeals.

would avoid having to establish that the taxpayer had acted fraudulently or in a willful manner to evade or defeat the tax to preclude the discharge. Such a result is unsupported by the plain language of the Bankruptcy Code and is contrary to the intent of Congress as evidenced by the plain language of the Bankruptcy Code.

The Bankruptcy Court issued its decision on February 24, 1997. In its decision, the Bankruptcy Court concluded that the IRS had not met its burden[4] to establish an exception to discharge. The Bankruptcy Court, following this Court's decision in *United States v. Ron Pair Enterprises*, 489 U.S. 235 (1989), applied the plain language of 11 U.S.C. § 523(a)(1)(B) to conclude that this burden was not met. The Bankruptcy Court also concluded that to require tax returns be filed prior to assessment, in order to obtain the discharge, would impose a significant burden on debtors, a burden not specifically set forth in the Bankruptcy Code.

The IRS appealed the decision of the Bankruptcy Court to the District Court. Briefs were submitted by the parties which repeated the arguments made before the Bankruptcy Court. The District Court issued its decision on September 10, 1997 affirming the Decision of the Bankruptcy Court.

The IRS appealed the Decision of the District Court to the Court of Appeals. After the briefs were filed, the Court of Appeals heard oral argument. The Decision of the Court of Appeals was issued on January 22, 1999, which reversed the Decision of the District Court.

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4. There is no dispute that the IRS, as the party opposing the discharge, had the burden to prove by a preponderance of the evidence that an exception to discharge applied. *See, e.g., Grogan v. Garner*, 498 U.S. 279, 287 (1991).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED AS THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE CLEAR AND UNAMBIGUOUS LANGUAGE OF THE BANKRUPTCY CODE.

Section 727 of the Bankruptcy Code evinces Congressional intent that certain debts of individuals be discharged so that these individuals can obtain a fresh start from their financial difficulties. This Court has repeatedly stressed the importance of the "fresh start" afforded individual debtors under the Bankruptcy Code. *See, e.g., Stellwagen v. Clum*, 245 U.S. 605, 617 (1918). In fact, exceptions to discharge are to be narrowly construed. *See, e.g., In re Ward*, 857 F.2d 1082, 1083 (6th Cir. 1988). However, the discharge of debts, and the accompanying opportunity for a fresh start, is not unlimited. Congress included within the Bankruptcy Code standards to determine which debts shall not be discharged. These standards are set forth in Section 523(a) of the Bankruptcy Code.

With respect to unpaid tax liabilities, Congress elected to permit certain tax obligations to be discharged and other tax obligations not to be discharged. For example, if the debtor failed to file *any* tax returns, the debtor is not entitled to a discharge of the tax obligations. 11 U.S.C. § 523(a)(1)(B)(i). Additionally, if the IRS establishes that the taxpayer filed a fraudulent return or had "willfully attempted in any manner to evade or defeat such tax," then the tax obligations would not be discharged pursuant to 11 U.S.C. § 523(a)(1)(C).

Congress specifically permitted the discharge of taxes even where the tax returns were not timely filed. Section 523(a)(1)(B)(ii) permits a discharge of taxes for taxes due with respect to a return which was filed: (1) after the date on which the return was due; and (2) more than two years before the filing of the petition. This section does not impose the additional requirement that the tax returns be filed before assessment.

In deciding which tax obligations may be discharged, Congress was aware of the IRS assessment process and made a choice as to the affect of assessment on the availability of discharge.[5] Section 523(a)(1)(A) excepts from discharge those taxes specified in 11 U.S.C. § 507(a)(8). Section 507(a)(8)(ii) specifies taxes "assessed within 240 days . . . before the date of the filing of the petition." as being entitled to priority treatment and, under Section 523(a)(1)(A), exempt from discharge. Since Petitioner's tax obligations were assessed more than 240 days prior to the filing of his petition, the Court of Appeals erred in concluding that the tax obligations could not be discharged.

The provisions of the Bankruptcy Code which control the discharge of tax obligations are clear and unambiguous. Pursuant to the Court's decision in *Ron Pair*, and the decision of the Sixth Circuit in *In re Laurian*, 113 F.3d 595 (6th Cir. 1997), if a statute is clear and unambiguous, there is no need to look behind the statute for its meaning. Nothing in these sections indicate that the availability of a discharge from tax obligations relates to, or is impacted by, the process of the

5. Under the rule known as "the negative pregnant", it is presumed that Congress acted deliberately in choosing any such disparate treatment. *See, e.g., Gozlon-Peretz v. United States*, 498 U.S. 404 (1991).

IRS in issuing notices of tax deficiency, preparing SFRs and/or assessing tax obligations. Instead, the language of the Bankruptcy Code is clear — if the taxpayer files non-fraudulent tax returns prior to the filing of a bankruptcy petition, waits at least two years between the filing of the tax returns and the filing of the bankruptcy petition, then the taxpayer is entitled to a discharge of the tax liabilities *provided* that the taxpayer did not engage in any willful conduct to evade the payment of his tax obligations.

The Court of Appeals focused on the meaning of a "return" under both the Bankruptcy Code and the Internal Revenue Code, though neither specifically defines the term "return". This Court has provided guidance on what it, or is not a return. *See, e.g., Germantown Trust Co. v. Commissioner of Internal Revenue*, 309 U.S. 304 (1940); *Zellerbach Paper Co. v. Helvering*, 293 U.S. 172 (1934). The courts which have adopted the reasoning of these decisions have established a four part test. In this case, the analysis turned on the fourth element, whether the return represented an "honest and reasonable attempt to satisfy the requirements of the tax law."[6] *See, e.g., Beard v. Commissioner*, 82 T.C. 766, 777 (1984), *aff'd*, 793 F.2d 139 (6th Cir. 1986).

In this case, the facts are clear that the Petitioner complied with the provisions of the Internal Revenue Code, the Bankruptcy Code and the applicable case law and was entitled to a discharge of the tax obligations. Tax returns, on the forms prescribed by the IRS, were signed, sworn to, filed by the Petitioner and accepted by the IRS. The tax returns were filed

6. The other three elements, which are not in dispute in this case, are (1) the document must purport to be a return; (2) the document must be sworn to; and (3) the document must contain sufficient information to allow the calculation of the tax.

more than two years prior to the filing of the bankruptcy petition and were, on their face, regular. 11 U.S.C. § 523(a)(1)(C) has no application to this case because the IRS did not argue that the Petitioner engaged in willful conduct in an attempt to defeat or evade the tax. Accordingly, the Court of Appeals erred in concluding that Petitioner's tax obligations could not be discharged.

In reaching its decision, the Court of Appeals concluded that the tax returns filed by the Petitioner had to have a tax purpose to constitute a "return" and obtain a discharge from taxes pursuant to 11 U.S.C. § 523(a)(1)(B). However, there is no support in the Bankruptcy Code for such a conclusion. Additionally, the Court of Appeals did not cite any decision, opinion or legal authority to support its conclusion. By adding the requirement that tax returns be filed prior to assessment, the Court of Appeals has frustrated Congressional intent, as evidenced by the clear and unambiguous language of the Bankruptcy Code, that debtors may be entitled to a discharge of their tax obligations even though their tax returns are not timely filed.

Additionally, the conclusion of the Court of Appeals is not supported by the language of the Internal Revenue Code, which does not define what is, or what is not, an acceptable, timely tax return. The Internal Revenue Code merely requires that returns be filed and that the returns which are filed contain all the required information. 26 U.S.C. § 6011(a). The Internal Revenue Code does not provide when a return, not timely filed, can no longer be considered a return for tax purposes. Neither the parties nor the Court of Appeals were able to cite any decision of any court which sets forth such a holding. On these important questions of both bankruptcy and tax law, the Decision of the Sixth Circuit should not be the controlling authority.

Therefore, the Court should grant the Petition for Writ of Certiorari to review the Decision of the Court of Appeals and resolve these unanswered, significant questions of both bankruptcy and tax law.

II.

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH A DECISION OF THE BANKRUPTCY APPELLATE PANEL FOR THE TENTH CIRCUIT AND WITH OTHER FEDERAL COURT DECISIONS.

Although this case presented a case of first impression before the Sixth Circuit Court, and is a case of first impression before the Court, other courts, at both the bankruptcy appellate level and below, have rendered decisions on this issue. Not only do these decisions cite the opinions of the Bankruptcy Court and District Court, these decisions also reject an alternative analysis provided by the courts of the Northern District of Ohio. While this case was proceeding through the appellate process, a decision on similar facts was rendered by the Bankruptcy Court and District Court of the Northern District of Ohio, *In re Mickens*, 215 B.R. 693 (Bankr. N.D. Ohio 1997), *aff'd*, 214 B.R. 976 (N.D. Ohio 1997), *aff'd*, *In re Mickens*, (No. 97-4163) __ F.3d __, 83 A.F.T.R. 2d 99-738 (6th Cir. Jan. 29, 1999). In *Mickens*, the District Court reached the opposite conclusion and decided that the tax obligation could not be discharged. However, the cases decided by other jurisdictions following *Hindenlang* and *Mickens* have cited *Hindenlang* as the more reasoned analysis of the issue.

In *In re Savage*, 218 B.R. 126 (10th Cir. BAP 1998), the 10th Circuit Bankruptcy Appellate Panel began its analysis with the plain language of the Bankruptcy Code. Since

Congress had excluded any reference to assessment in § 523(a)(1)(B)(i), unlike the reference to assessment in 11 U.S.C. § 507(a)(8)(A)(ii), the court would not add a reference to assessment to the statute regarding the discharge of tax obligations. The court in *Savage*, also relying upon Congressional intent, concluded that the fourth element of the *Beard* test was that the return "*on its face* constitute an honest and genuine endeavor to satisfy the law." *Id.*, at 132 (emphasis added) (citing S. Rep. No. 1106, 95th Cong., 2nd Sess. 22 (1978)). In this case, there was nothing on the face of the returns filed by the Petitioner which would have indicated that the returns were not an honest and genuine endeavor to satisfy the law.

In *In re Pierchoski*, 220 B.R. 20 (W.D. Pa. 1998), the Bankruptcy Court also concluded that § 523(a)(1)(B) does not contain any requirement that a return must be filed prior to the assessment of taxes by the IRS. To adopt the reasoning of the IRS, the bankruptcy court concluded, would lead to a conclusion in direct conflict with the express language of the Bankruptcy Code. *Id.*, at 24.

In *In re McGrath*, 217 B.R. 389 (Bankr. N.D. N.Y. 1997), the bankruptcy court agreed with *Hindenlang* that there is no provision in § 523(a)(1)(B) to deny a discharge on the sole basis that the return was filed after the tax obligations had been assessed. Instead, the court concluded that the appropriate statutory basis for such an analysis was under 11 U.S.C. § 523(a)(1)(C), which requires proof of a fraudulent return or proof that the taxpayer willfully attempted to evade or defeat the tax. *Id.*, at 394.

The courts in the above cases had two decisions to choose from, *Hindenlang* or *Mickens*. Each court has chosen the

Hindenlang analysis and Petitioner has been unable to find any reported decision decided prior to or after the Court of Appeals decision in *Hindenlang* which has adopted the *Mickens* analysis.[7] Therefore, the Court should grant Petitioner's Writ of Certiorari to resolve this split of authority between the Sixth Circuit and the Bankruptcy Courts, District Courts and Bankruptcy Appellee Panels of its sister circuits.

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7. The District Court for the Middle District of Tennessee has cited the District Court's decision in *Mickens* in *Gentry v. United States*, 223 B.R. 127 (M.D. Tenn. 1998), *aff'g. In re Gentry (Gentry v. United States)*, 214 B.R. 847 (Bankr. M.D. Tenn. 1997). However, the question at issue in *Gentry* concerned the sufficiency of the document filed by the taxpayer, not the timing of the filing of the proposed return.

CONCLUSION

This case presents a question of exceptional importance to both bankruptcy law, the availability of discharge, and to tax law, the collection of taxes. If the decision of the Court of Appeals is allowed to stand, many taxpayers, who have done nothing wrong other than to fail to timely file their tax returns, will be denied the opportunity to obtain the fresh start contemplated by the Bankruptcy Code. They will be denied the opportunity for a discharge, not because of any fraudulent, wrongful or willful misconduct, but for a variety of reasons. Contrary to the plain language of the Bankruptcy Code, the IRS will be able to collect post-discharge, the taxes without proving that the reason for the failure to file was a willful attempt to evade the payment of taxes. Unless and until Congress amends the Bankruptcy Code to grant the IRS this ability, the decision of the Court of Appeals must be reversed.

Accordingly, the Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

WILLIAM B. FECHER
Counsel of Record
ALAN J. STATMAN
DOUGLAS HAMAN
REISENFELD & STATMAN
Attorneys for Petitioner
2355 Auburn Avenue
Cincinnati, Ohio 45219
(513) 381-6810